California Council for Environmental and Economic Balance

100 Spear Street, Suite 805, San Francisco, CA 94105 • (415) 512-7890 • FAX (415) 512-7897

September 27, 2011

Chairman Mary Nichols and Members of the Air Resources Board
Air Resources Board
State of California
1001 I Street
Sacramento, California 95814

Subject Comment Letter Regarding the September 15-day Notice for the Mandatory Reporting Regulation.

The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit coalition of business, labor and public leaders that works to advance policies that protect public health and the environment while expanding economic opportunities for all Californians. CCEEB would like to thank the Chair, Board members, and staff of the California Air Resources Board (ARB) for their diligent and continued work on the implementation of AB 32 and the complex regulatory structure created to reduce greenhouse gas emissions by 2020 in California to 1990 levels.

CCEEB is appreciative of the time the enforcement and legal staff has spent working with us on our major concerns with this regulation. While there are some positive steps made in this draft there are some real and persisting concerns with the Mandatory Reporting Regulation (MRR). CCEEB looks forward to continuing to work through these concerns in a 45-day notice in the future. Attached to these comments is specific regulatory language that would alleviate the concerns that are outlined below. CCEEB is specifically concerned with the:

1.) Compliance
2.) Lack of a Safe Harbor when working with the 3rd Party Verifiers
3.) Lack of an administrative appeal or review process.

Compliance

As written CCEEB does not believe good actors will be able to maintain compliance with this iteration of the MRR. While CCEEB has discussed these issues extensively with staff, 95107 of this regulation continues to create persisting problems. This section is seemingly written from the lens of a prosecutor and not from the lens of a regulator. As CCEEB interprets the changes of Section 95107 it is still improbable that entities can stay in compliance, because any changes made to the report during

the verification process could be interpreted as a violation. With several years of reporting complete it is well known that during the verification process, even in situations where the report's emissions are not changed, there will be changes to information within the report.

While current staff may agree that this is not the intent, the letter of the regulation makes it clear that these changes are each separate violations. Though staff and the ARB may want the flexibility to pursue bad actors that intentionally under-report, the way Section 95107 is currently written puts most compliance entities at risk of non-compliance and potential violation. This ambiguity should not be practiced and CCEEB has, in previous meetings and comments, made specific recommendations to accomplish the same goals. It is fundamentally wrong to treat all entities as violators when the regulation requires verifiers to ensure that the reports are accurate.

Additionally, compliance to this regulation has become a part of several Title V permits and maintaining compliance to both regulations is critical to the operation of the permit holders. If compliance is not capable in MRR there will be serious repercussions and economic impacts on permit holders.

Safe Harbor

The ARB should clarify that when a report is submitted and the operator is working with the verifier on corrections/edits… no penalties or violations will be assessed during this period.

CCEEB believes that if the pertinent emissions data report did not contain a material misstatement, as determined through the verification process and the newly identified unreported emissions are not due to an intentional error or fraud, the covered entity should be required to submit in a timely manner (measured from the date the shortfall was formally reported to the entity) compliance instruments in the amount of the excess emissions. Additionally, there would be no violation of either the mandatory reporting or the market-based compliance mechanism (cap-and- trade) regulations unless the entity failed to submit the additional compliance instruments.

CCEEB further suggests the following:

- The ARB should adjust without penalty all pertinent baselines for which a calculation, verification or reporting from a nonmaterial misstatement or mistake is found.
- If a mistake is made resulting in CO2e emissions over the amount reported and compliance instruments not surrendered, the "new" compliance obligation would only be that amount over the 5 percent error margin.
- If a mistake is made resulting in CO2e emissions under the amount reported and for which compliance instruments were surrendered, compliance instruments should be returned to the account of a covered entity for the amount over the 5 percent error margin.
- CCEEB is not proposing any restriction or limit on ARB's efforts to assure program integrity, such that a mistake does not include any tampering of meters or other actions knowingly taken contrary to the AB 32 regulations. Similarly, the proposed "safe harbor" for mistakes in no way alters or constricts ARB's audit and program oversight authority.

Request for clarification

CCEEB understands that it is ARB's intent that an entity is in compliance with the requirement that information be measured, collected, recorded, and preserved , if an entity complies with alternative provisions of the regulation, such as the pertinent missing data substitution or interim data collection provisions. CCEEB requests ARB to clarify in their Final Statement of Reason that a violation does not occur when an operator complies with an alternative provision applicable under the circumstances.

Appeals and Review

CCEEB believes that it is entirely appropriate to expect companies to maintain auditable quality data for verification and enforcement purposes. Consistent with our recommendation that reporting protocols be consistent with Climate Action Reserve protocols so that the registry can be relied upon, CCEEB urges that auditing and enforcement be conducted on a statewide basis.

CCEEB has major concerns with the lack of an appeals process for enforcement actions of 'alleged' violations of data reporting requirements. In the event that mandatory reporting data at a specific facility is not available due to monitoring equipment failure, out of tolerance calibration, etc., procedures should be specified so that a facility can avoid incurring a violation and the resultant penalties. While alternative emissions calculation methods are specified in the regulations, those particular calculation formulas may not be as accurate as best available data/engineering estimates from the facility. With hundreds of facilities reporting to the ARB it is irrefragable that disputes will arise between the regulated community, 3rd party verifiers, and the ARB. Without a formal and structured process there will be no predictability to how these issues will be resolved further exacerbating the uncertainties to an emerging program and the inability to demonstrate compliance while the specific facility issues are resolved. Additionally, every air district and other statewide boards, departments or offices have statutory structures to resolve disputes in a manner that allows the facility to remain in compliance.

Specific Recommendations – ***Section 95107***

CCEEB appreciates some of the proposed revisions and commitment to continued work on these provisions ARB made relative to the enforcement penalty provisions in Section 95107. However, the changes do not recognize important aspects of the AB 32 verification program including the cost impact implications if ARB continues to maintain a per ton penalty provision. Our specific concerns are described as follows:

Per Ton Penalty Metric Is Excessive and Inappropriate for AB 32 Program Requirements

CCEEB and other industry groups have discussed with ARB concerns with proposed penalty provisions. CCEEB believes it is inappropriate for ARB to structure a penalty structure based on a per ton basis, simply because the AB 32 greenhouse gas (GHG) emission reporting program requirements result in inventory amounts that are exponentially greater compared to other (criteria pollutant inventory) programs. Therefore, a "per ton" criteria as a penalty provision is not only inappropriate, but could result in penalties in the tens or hundreds of millions of dollars. Recognizing these differences between the AB

32 GHG program and traditional criteria pollutant program requirements, CCEEB has previously suggested and continues to support a more appropriate penalty on a more appropriate metric, such as a "Per 1,000 Ton" metric, instead of per ton penalty.

CCEEB recommends moving second sentence in 95107(c) to 95107(a) and changing the word "subparagraph" to "section"

(a) Penalties may be assessed for any violation of this article pursuant to Health and Safety Code section 38580. In seeking any penalty amount, ARB shall consider all relevant circumstances, including any pattern of violation, the size and complexity of the reporting entity's operations, and the other criteria in Health and Safety Code section 42403(b). ARB will not initiate enforcement action under this section until after any applicable verification deadline for the pertinent report.

Sub-sections (b) & (c) Fail to Recognize a Facility Obtaining a Positive or Qualified Positive Verification Determination:
CCEEB has expressed continued concern with proposed Sub-sections (b) & (c), which as written, allows ARB authority to assess a penalty on any facility for each metric ton of CO2e emitted and not reported, and for each failure to measure, collect, record or preserve information required by this article, *regardless* of the fact the facility had obtained a positive or qualified positive verification from their verifier.

While the most recent revisions to Sections (b) and (c) provide some level of understanding in terms of when enforcement would initiate, and for Section (b) some clarification that as long as the facility complies with the provisions of the article (MRR), they are not in violation, CCEEB remains concerned with these sections and provides the following comments:

- **Section (b):** CCEEB has persisting concerns with the proposed revisions to Section (b), the new language added, while it clarifies no "enforcement action" will be taken until after the verification deadline date – as written it implies that a violation has occurred, and that no "enforcement action" will be taken during the verification period. CCEEB assumes it is not ARB's intent to pre-suppose that violations are occurring, however, as written it can be interpreted in that manner.

  CCEEB recommends ARB revise Section (b) to clarify that, after a facility has obtained a positive or qualified positive verification, no violation or enforcement action will be taken, unless ARB determines through an audit review or other information that demonstrates a pattern in past MRR reports of under reporting of GHG emissions by the facility.

Recommendation: CCEEB recommends ARB revise Section (b) as follows: "Each metric ton of CO2e emitted but not reported as required by this article is a separate violation. ARB ~~will not~~ *may* initiate enforcement action under this subparagraph ~~until~~ *alleging that emissions were under-reported in an emissions data report only* after any applicable verification deadline for the pertinent report *and if ARB determines that there is a recurring pattern of under-reporting.*

- **Section (c):** CCEEB requests ARB state in the Final Statement of Reason (FSOR) that for enforcement purposes, the MRR rule must be read as a whole, and a violation does not occur when an operator complies with an alternative provision applicable under the circumstances. For example, information will be considered to be measured, collected, recorded and preserved "in the manner required by this article" and no violation will occur when an operator complies with the pertinent missing data substitution or interim data collection procedures specified in Section 95129.

Conclusion

CCEEB would like to thank ARB for considering its comments on the proposed changes to the mandatory reporting regulation. It is our understanding from meeting with staff and the Chair that there are still changes to come in 2012 and CCEEB looks forward to being an integral contributor to these changes that make this regulation and AB 32 work. CCEEB is a unique organization that represents a broad cross-section of the covered entities in California. As such, CCEEB is in a position to represent diverse industry sectors and would like to assist the ARB in developing these ideas further. CCEEB looks forward to continuing our work with ARB staff on our proposals. If there are any questions please call Robert Lucas at (916) 444-7337.

Sincerely,

Robert W. Lucas
Climate Change Project Manager

Gerald D. Secundy
President

cc: Matthew Rodriguez, Secretary, California Environmental Protection Agency
James Goldstene, Executive Officer, California Air Resources Board
Ellen Peter, Chief Counsel, California Air Resources Board
Bob Fletcher, Deputy Executive Officer, California Air Resources Board
Richard Corey, Chief, California Air Resources Board
Edie Chang, Assistant Division Chief, California Air Resources Board
Michael Gibbs, Acting Deputy Secretary, Climate Change, Cal/EPA
The Gualco Group, Inc